(6)

No. 97-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY LIMITED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF LEAGUE FOR COASTAL PROTECTION, PLANNING AND CONSERVATION LEAGUE, CENTER FOR MARINE CONSERVATION, CHESAPEAKE BAY FOUNDATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL WILDLIFE FEDERATION, AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

JOHN D. ECHEVERRIA
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9850

Counsel of Record for Amici Curiae

PRESS OF BYRON S. ADAMS ◆ WASHINGTON, D.C. ◆ 1-800-347-8208

27 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities (continued)

Table of Authorities (continued)

MISCELLANEOUS

Table of Authorities (continued)

STATEMENT OF INTEREST

The *amici curiae* — League for Coastal Protection, Planning and Conservation League, Center for Marine Conservation, Chesapeake Bay Foundation, National Trust for Historic Preservation, National Wildlife Federation, and Sierra Club — are organizations dedicated to the wise use and conservation of natural and cultural resources and therefore support reasonable government regulation of land use to protect the public interest.* The *amici* have a substantial interest in this case because the court of appeals adopted a standard for identifying a taking under the Takings Clause which contradicts the language and original understanding of the Clause, is inconsistent with the principles established by the Court's prior takings decisions, and would impose new financial liabilities on governments at all levels. This expansion of liability under the Takings Clause would not only increase the financial burdens on taxpayers, but also would undermine the ability of democratically elected officials to resolve important, complex issues in as fair and balanced a fashion as possible.

This *amicus* brief focuses on two issues: First, whether the court of appeals erred by attempting to defend the judgment by relying on the Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Second, whether the court of appeals erred by concluding that an analysis of whether the City's action furthered a legitimate government purpose was relevant, not simply to the due process claim in this case, but

---

* Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. *See* Supreme Court Rule. 37.

to the claim that the City effected a compensable taking under the Fifth Amendment.

SUMMARY OF ARGUMENT

The court of appeals erred by relying on *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which is irrelevant to this case. *Dolan* establishes a special test for reviewing physical invasions of private property effected through permit conditions attached to discretionary permits. This case, on the other hand, involves a takings challenge to a city's restrictions on permissible land uses.

The court of appeals also erred by concluding that an evaluation of whether a government action furthers a legitimate public purpose provides an appropriate test for determining whether a government restriction on land use effects a compensable taking. Including a means-ends test as a general component of takings analysis would conflict with the language of the Takings Clause, the original understanding of the Clause, basic principles supporting the Court's takings jurisprudence, and several of the Court's leading takings precedents. While the Court has stated on several occasions that a government action "effects a taking" if it "does not substantially advance legitimate state interests," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court has never applied that test to find that ordinary land use restrictions effect a taking. The *Agins* standard supports and is logically related to the test developed in *Dolan* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) for reviewing physical invasions. But the Court should reject the position that means-ends analysis provides an independent basis for determining whether a land use restriction effects a taking under the Takings Clause.

ARGUMENT

I. *Dolan* Is Irrelevant to this Case Because the *Dolan* Standard is Limited to Regulatory Conditions Effecting a Permanent Physical Invasion of Property, and the Land Use Regulation in This Case Did Not Effect a Permanent Physical Invasion.

The court of appeals erred by relying on the Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in affirming the district court's denial of the City's motion for judgment n.o.v. In fact, the jury was not given any instructions which reflected this decision, which was not even decided until after the jury entered its verdict. In any event, the court of appeals was wrong to conclude that *Dolan* provides an appropriate legal standard for determining whether a limitation on the use of property, as opposed to a regulation authorizing a physical invasion of private property, effects a compensable taking.

Dolan, and the Court's earlier decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), addressed regulatory permit conditions which effect a permanent physical invasion of private property, and they establish a special standard which is explained and justified by, and logically confined to, that narrow context. In both cases, the government imposed a condition requiring the owner to grant public access to the property. Standing alone, these requirements indisputably would have effected a taking requiring payment of just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S at 831. *See generally Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The issue the Court faced in those cases was whether a taking could be avoided because the requirements, rather than being imposed as free-standing mandates, were attached

as conditions to discretionary permits which the government had no constitutional obligation to grant.

The Court held that a finding of a taking could be avoided, provided that the conditions were sufficiently closely related to the legitimate purposes of the regulatory process itself. More specifically, the Court ruled that attaching otherwise unconstitutional conditions to regulatory permits would *not* effect a taking if: (1) there was an essential "nexus" between the conditions and the government's regulatory purposes, *Nollan*, 483 U.S. at 837, and (2) there was a "rough proportionality" between what the owner surrendered and the impacts of the proposed development, *Dolan*, 512 U.S. at 391. Thus, *Nollan* and *Dolan* established a special standard of takings analysis to address a special situation. This standard does not apply to traditional regulatory programs which do not involve conditions effecting physical invasions, *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 831, and which therefore are entitled to the usual deference accorded local land use decision-making.

Consistent with the holdings and reasoning in *Dolan* and *Nollan*, lower federal and state appellate courts have almost uniformly read these decisions as being limited to the physical exactions context. *See, e.g., New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997) (*Dolan* and *Nollan* irrelevant to takings challenge where zoning ordinance "told [the owner] how it could use the property. . ., but did nothing to require [the owner] to open its property to the public for use just as the public wished"); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure");

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) (*Dolan* applies only to regulations involving dedications of land). Indeed, even within the Ninth Circuit itself, the court of appeals' decision is apparently aberrational. *See Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) ("no decisions have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land"); *Garneau v. City of Seattle*, 1998 WL 214579 (9th Cir. 1998) (*Dolan* analysis rests on condition which effects *per se* physical occupation taking).

Here, in contrast to *Dolan*, the government action *does* involve, in the Court's words, "simply a limitation on the use" respondent could make of the property, *Dolan*, 512 U.S. at 385, and not a condition effecting a physical occupation of property. Therefore, *Dolan* (and *Nollan)* do not apply in this case. The Court should vacate the decision of the court of appeals for reconsideration of the City's appeal based on a proper legal standard.[1]

---

[1] Apart from the fact that the holdings and logic of *Dolan* and *Nollan* do not apply in this case, it also is impossible as a practical matter, as the court of appeals' somewhat tortured analysis illustrates, to apply the "essential nexus" and "rough proportionality" standards developed in those cases to this type of regulatory action. The "nexus" test first announced in *Nollan* focuses on whether a condition serves the same objective as would an outright regulatory denial; the "rough proportionality" test focuses on whether the extent of a condition is proportional to the impacts of development mitigated by the imposition of the condition. Both of these tests represent meaningful judicial standards in the context of exaction conditions. On the other hand, these tests cannot sensibly be applied in a case involving the outright denial of a regulatory permit, which would include no conditions for a court to analyze.

II. Whether a Regulation Furthers a Legitimate Government Purpose Raises a Threshold Issue About the Regulation's Validity, Not an Issue Dispositive of Whether the Regulation Effects a Taking Requiring Payment of Just Compensation.

The court of appeals incorrectly concluded that an evaluation of the legitimacy of governmental ends, and the reasonableness of the means selected to achieve those ends, represents an independent test for all government regulation in the land use area under the Takings Clause. This legal error represents a second basis for reversing the decision of the court of appeals.

The district court's instructions, which the court of appeals ratified, laid out this purported means-ends test at some length. The trial court first instructed the jury that "one of your jobs as jurors is to decide if the city's decision here substantially advanced . . . [a] legitimate public purpose." 93 F.3d at 1429. The district court then instructed that "[t]he regulatory actions of the city or any agency substantially advance[ ] a legitimate public purpose if the action bears a reasonable relationship to that objective." *Id.* Finally, the court framed the ultimate question for the jury as follows: "[I]f the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and [a] legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city." *Id.*

While the district court's instructions offered varying formulations of this purported standard, it is nonetheless clear that these instructions framed an incorrect test for determining whether a government action effects a compensable taking.

To be sure, the Court has, on various occasions, suggested that means-ends analysis plays a role in takings analysis. Specifically, the Court has stated that a government action "effects a taking" if it "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (citing *Agins*). However, the Court has never applied this standard to find a taking in a case such as this involving regulations limiting the permissible uses of property. The *Agins* standard supports and is logically related to the test the Court developed in *Nollan* and *Dolan* for evaluating under the Takings Clause conditions effecting a physical invasion. But, as explained below, the Court should not extend the *Agins* standard beyond that specialized context to circumstances where it has no logical role.

The claim that a government action fails to advance — whether "substantially" or "reasonably" — a legitimate government purpose does potentially raise a viable constitutional issue. But it does not represent a viable claim of a compensable taking under the Takings Clause. It represents a potential due process violation .[2]

Section A below discusses why means-ends analysis in a takings compensation case would conflict with the language

---

[2] The trial court rejected the due process claim in this case and the respondent did not appeal the resolution of that issue. That the means-ends takings claim prevailed at trial simply reflects the fact that the court resolved the mean-ends issue under the due process label and a jury was (erroneously) assigned the task of resolving the same issue again under the takings label, as well as the fact that the court of appeals (erroneously) believed that the jury was not required to accord any deference whatsoever to the conclusions and reasoning of the City.

of the Takings Clause, the original understanding of the Clause, the basic principles the Court has identified as underlying takings doctrine, and several of the Court s leading takings precedents. Section B discusses the *Agins* "substantially advance" standard and explains why this standard should not be read to provide a test for identifying compensable takings resulting from ordinary land use regulations.

A. Means-Ends Analysis Is Not a Proper Component of the Inquiry Whether A Land Use Restriction Effects a Compensable Taking.

Plain Language. A government action which fails to advance a legitimate government purpose cannot, on that basis, be found to effect a compensable taking for the simple reason that such an action is not a taking "for public use" within the plain meaning of the Takings Clause. Indeed, the claim that a government action fails to serve a legitimate public purpose contradicts the requirement for a lawful taking that the action must serve a "public use." Rather than providing a basis for a taking claim, a government action that does not serve a public use is already invalid under the Due Process Clause.

This reading of the Takings Clause also is supported by the important differences in language between the Takings Clause and the Due Process Clause. The Takings Clause in the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation," while the Due Process Clause in the Fifth and Fourteenth Amendments, states that no person shall be "deprived" of "property, without due process of law." Given the difference in language, the same means-ends claim which states a cause of action under the Due Process Clause cannot logically state a cause of action

under the quite different language of the Takings Clause. *See Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) ("When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.").

Original Understanding. The application of a means-ends test under the Takings Clause also conflicts with the original understanding of the Clause. The Takings Clause was originally intended to address direct appropriations of private property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014 (prior to the early 20th century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . ., or the functional equivalent of a 'practical ouster of [the owner's possession.'"); *see also* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia L. Rev. 782 (1995). In deference to the original understanding of the Takings Clause, the Court has confined the Clause in the area of land use regulation to those "extreme circumstances" where regulations impose severe economic burdens analogous to direct physical appropriations. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). *See Lucas v. South Carolina Coastal Council*, *supra*; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Application of the means-ends test, by contrast, would extend the Takings Clause to circumstances where regulations may have little or no adverse economic impact and bear no similarity to the type of direct appropriations at the heart of takings doctrine. *Compare Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) (rejecting means-ends takings test because it would

have supported claims for financial compensation when economic injury was only nominal). This reading of the Takings Clause would unhinge the Court's takings jurisprudence from any plausible connection to the original understanding of the Takings Clause. The conclusion that the Takings Clause encompasses a means-end inquiry cannot be squared with the limited role of the judicial branch in interpreting and enforcing the Constitution.[3]

Basic Takings Principles. The means-ends test also conflicts with several general principles which the Court has identified as supporting the Court's takings jurisprudence. First, the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If a regulation advances a legitimate public purpose, "it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). The Court has ruled, under that

---

[3] In keeping with the traditional view that a regulatory taking must be closely akin to a direct physical occupation, the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), stated that when a regulation is found to effect a taking, "the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. Exercise of eminent domain is a logical option in the case of a regulation, as in *First English*, which allegedly denies the owner "all use" of the property. *Id.* at 308. But an exercise of the power of eminent domain makes no sense in response to a determination that a regulation fails to advance a legitimate governmental purpose, because the government would not be legally authorized to take the property. The *First English* Court obviously did not conceive that a taking could be established by demonstrating that the government action was invalid. *See* p.12, *infra*.

circumstance, that it is "fair" for the public to pay just compensation. On the other hand, the claim that a government action *fails* to advance a legitimate public purpose demonstrates *no* public benefit for which the public can fairly be asked to pay.

This conclusion also is consistent with the principle that the Takings Clause is not a substantive limitation on government power, but simply a condition on the exercise of government power. As the Court has frequently stated, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). "The protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but provides that it shall not be taken for such use without just compensation." *Pennsylvania Coal Co v. Mahon*, 260 U.S. 393 (1922) (emphasis added). Accordingly, in *Mahon*, for example, the Court did not closely examine whether the Kohler Act reasonably implemented legitimate public purposes, but simply "assume[d] . . . that the statute was passed upon the conviction that an exigency existed that would warrant it." *Id.* at 416. "[T]he question at bottom" under the Takings Clause, the Court continued, "is upon whom the loss of the changes desired should fall." *Id.*

Leading Precedents. The means-ends test also conflicts with the holdings and reasoning of some of the Court's leading takings precedents. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), a challenge to the legitimacy of an exercise of the power of eminent domain accompanied by payment of compensation, the Court held that the Takings Clause prohibits a taking not for a "public use," whether just

compensation is paid or not. Resolution of the issue whether a government action meets the "public use" requirement depends upon whether "the legislature's purpose is legitimate," and whether "its means are not irrational," *id.* at 242-43. This is the same standard that the Court uses to determine whether an action is valid under the Due Process Clause. *See id.* at 241, *discussing Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 416 (1896), and *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) (both due process cases).

Thus, under *Midkiff*, a means-ends analysis determines whether or not a government action is within the scope of governmental authority to begin with, regardless of whether compensation is paid. The same analysis logically cannot provide the test for determining whether a government action demands compensation pursuant to the Takings Clause. Indeed, the test applied by the court of appeals would turn *Midkiff* on its head. *See* Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. Energy Nat. Res & Envtl. L. 9, 33 (1993) (discussing conflict between purported means-ends takings test and *Midkiff*). *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 (1987) (Rehnquist, C.J. dissenting) (fact that regulation serves public purpose "does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a *necessary prerequisite* to the government's exercise of its taking power") (emphasis added).

The means-ends test under the Takings Clause also would conflict with the Court's decision in *First English*. As Chief Justice Rehnquist explained in that case, the Takings Clause "is designed . . . to secure *compensation* in the event of *otherwise proper* interference amounting to a taking." 482 U.S. at 315 (second emphasis added). *See also Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *First English*). A

government action which fails to advance a legitimate government interest does not result in a compensable taking because it is not an "otherwise proper" government action. A regulation which is "improper" in the nominal sense that it effects a taking without providing just compensation is, of course, subject to challenge under the Takings Clause. However, according to *First English*, the Takings Clause does not provide just compensation unless the challenged action is "*otherwise* proper," that is, not unlawful on some *other* basis, such as the Due Process Clause.

Of course, the Court's decision in *First English* definitively disposed of the argument that regulations which eliminate a property's economic value can never effect a compensable taking and instead represent only invalid exercises of government power under the Due Process Clause. *See First English*, 482 U.S. at 314; *see also San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649 n.14 (1981) (Brennan, J., dissenting) (discussed with approval in *First English*). At the same time, the *First English* decision provides no support for the quite different position, which the Court has *never* embraced, that a regulation which violates the Due Process Clause *necessarily* results in a taking requiring the payment of just compensation. The Court's statement in *First English* that recovery of just compensation is limited to government actions which are "otherwise proper" refutes this position.

Indeed, even Justice Brennan, who championed the view that the Takings Clause mandates compensation for regulatory takings, distinguished a claim that a valid government action effects a compensable taking from the "different case . . . where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use.'" *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 656 n.23. Speaking

for himself and three other Justices, Justice Brennan observed, "the government entity may not be forced [in that case] to pay just compensation under the Fifth Amendment," but the landowner might "nevertheless have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation." *Id.* Significantly, none of the Justices in the majority, which concluded that the case had to be dismissed for want of a final judgment, disputed Justice Brennan's view that regulations which do not further a legitimate public purpose cannot be compensable takings under the Takings Clause. *See San Diego*, 450 U.S. at 632-33 (Rehnquist, J., concurring) (stating that he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan").

B. *Agins* Should Not Be Read to Support the Conclusion that Means-Ends Analysis Is a Free-standing Test for Determining Whether a Restriction on Land Use Effects a Taking.

As stated above, the Court has on various occasions stated that a regulation "effects a taking" if it "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, the Court has never applied this standard to find a taking as a result of regulation limiting the permissible uses of land. *Agins*, which is most often cited as the origin of this purported test, does not support the conclusion that, in general, a compensable taking occurs when a government action fails to meet this means-ends standard. While the Court relied on the *Agins* standard to justify and explain the "essential nexus" test developed in *Nollan*, neither *Nollan* nor the Court's subsequent decision in *Dolan* supports applying the *Agins* standard outside of the physical invasion context.

Understood in historical context, the means-ends test in *Agins*, a brief, unanimous decision upholding a zoning ordinance, simply repeated the familiar principle that a regulation which fails to advance a legitimate governmental interest violates the Due Process Clause. The *Agins* opinion is best understood as referring to a government action which amounts to a due process violation and is therefore invalid, rather than to a government action which effects a taking requiring the payment of just compensation under the Takings Clause. Prior to *First English*, the distinction between "takings" and "due process" violations was far less clear than it is today. Indeed, as discussed above, there was debate at the time over whether regulations which "took" private property by eliminating its economic value effected a taking under the Takings Clause at all, or simply represented a due process violation. *See, e.g., Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-86 (N.Y.), *cert. denied and appeal dismissed*, 429 U.S. 990 (1976) (concluding that the word 'taking' was used in *Mahon* 'metaphorically,' and that the "gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the [case was] decided under that rubric"). *See also Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 197-200 (1985) (discussing due process theory at length).

Indeed, prior to the Court's clarification of the distinct character of the constitutional protection afforded by the Takings Clause, the Court frequently used the term "taking" to refer to a due process violation as well. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964) (addressing allegations that government action effected a "taking . . . of property without due process of law, and a taking of . . . property without just compensation"); *Oyama*

v. California, 332 U.S. 633, 635-36 (1948) (addressing claim that escheat action "takes property without due process of law"); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 416 (1896) (invalidating under the Due Process Clause a "taking" of private property, when the "order in question was not, and was not claimed to be, . . . a taking of private property for public use under the right of eminent domain"). The *Agins* Court's use of the term "taking" to refer to what was a due process issue was therefore consistent with longstanding Court practice, and did not establish a new, independent test under the Takings Clause.

That the *Agins* Court was referring to a due process violation is confirmed by the precedent upon which the Court relied to support this statement, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *See Agins*, 447 U.S. at 260. *Nectow* involved a constitutional challenge to a zoning regulation in which the owner alleged that the restriction did "not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188. As the Court's opinion in *Nectow* made abundantly clear, *Nectow* did *not* arise under the Takings Clause, but rather involved a claim that the ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment." *Nectow*, 277 U.S. at 183. Moreover, the page in the *Nectow* opinion to which *Agins* refers quotes from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), another land use due process case. *See also* 447 U.S. at 261. Thus, the Court's language in *Agins* clearly referred to a due process claim, not a takings claim. *See* Jerold Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation*, 23 *Urban Lawyer* 301, 314-16 (1991); Kenneth Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, in *Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas* 289, 291

(1996) ("the authority for the first prong of the *Agins* takings test was no authority at all; it was a case based solely on the due process clause").

The Court also used somewhat similar language in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) — "*a* use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose" — which, it has been suggested, also supports the notion of a general means-ends test under the Takings Clause. However, again, it is apparent from the context that the Court in *Penn Central* was simply restating the due process standard. The authorities upon which the Court relied to support this proposition included the *Nectow* due process decision, and *Goldblatt v. Hempstead*, 396 U.S. 590 (1962). While *Goldblatt* involved claims under both the Takings and the Due Process Clauses, *Penn Central's* reference to a means-ends standard draws upon *Goldblatt*'s discussion of the due process claim in that case.

The Court's different linguistic formulations — "substantially advance" (*Agins*), and "reasonably necessary to the effectuation of a substantial government purpose" (*Penn Central*) — could be read to articulate a means-ends standard under the Takings Clause which is somehow more demanding of government, and therefore distinct from traditional rational basis review under the Due Process Clause. However, for several different reasons, this potential argument must be rejected.

First, while the Court's verbal formulations have indeed varied, it is nonetheless clear from the Court's citations to *Nectow*, *Euclid*, and *Goldblatt* that the test in *Agins* (and in *Penn Central*) was derived from and simply restated the traditional due process test of an earlier era. It would be illogical to conclude that takings doctrine incorporates a

general means-ends standard that is similar to but more demanding than means-ends analysis under the Due Process Clause, when even a cursory reading of the Court's decisions shows that all of these formulations have a common origin in the Due Process Clause. Moreover, such an argument would produce the anomalous result that, if government acts rationally, but *no more than rationally*, to advance a legitimate state interest, it effects a taking, but if government acts less than rationally, there is no taking because the government action would fail the "public use" requirement of the Takings Clause.

Second, there is no plausible basis for believing that the Takings Clause independently supports some type of means-ends analysis, much less a type of means-ends analysis that would be more rigorous than means-ends scrutiny under the Due Process Clause. Certainly, this position gains no discernible support from the language of the Takings Clause, and it is refuted by the original understanding that the Takings Clause was intended to focus on direct appropriations imposing extreme economic burdens on individual owners.

While *dictum* in *Nollan* may be read to support a contrary view, *Nollan*, 483 U.S. at 834 n. 3, neither *Nollan*, nor the Court's later decision in *Dolan*, should be read to establish that the Takings Clause incorporates a means-ends test applicable to all governmental decision-making in the land use area. As discussed in section I, those cases involved physical invasions of private property. The decisions addressed whether and under what circumstances such impositions could be inoculated from a finding of a taking based on the fact that the invasions were imposed as a condition attached to discretionary permits. The Court concluded that a condition effecting a physical invasion will not be deemed a taking if an "essential nexus" exists and if the standard of "rough proportionality" is satisfied. This test is obviously similar to

(but not the same as) the *Agins* formulation of the traditional due process means-ends analysis. Thus, it was entirely natural that the Court in *Nollan* referenced the means-ends language from its earlier *Agins* opinion in framing the "essential nexus" test. *See* 483 U.S. at 834.

But the *Nollan/Dolan* inquiry does not extend to a claim under the Takings Clause based on a government action not effecting a physical invasion of private property. As the Court has noted time and time again, physical invasions authorized by regulation remove an essential right of ownership and thus should be scrutinized with the greatest care to assure that such measures are not an indirect method for taking private property without paying just compensation. *Nollan* and *Dolan* do not stand for the proposition that special scrutiny would be appropriate when reviewing all regulations in the land use area. Given the specialized context in which they apply, *Nollan* and *Dolan* do not establish that the language in *Agins* represents a general test for evaluating regulatory takings claims.[4]

The Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), decided one year after the Court's decision in *Nollan*, also supports the conclusion that *Agins* does not provide an independent test for all government regulations in the land use area. In a 6-2 decision involving a rent control law, the Court concluded that it would be premature to consider "any takings claim, because there was no evidence that the tenant hardship provision had ever been applied and

---

[4] It also is noteworthy that both *Dolan* and *Nollan* apparently involved claims seeking injunctive relief, which is ordinarily viewed as an appropriate form of relief for a due process violation, but not for an alleged taking. *See First English*, 482 U.S. at 314 (the Takings Clause "does not prohibit the taking of private property, but instead places a [compensation] condition on the exercise of that power").

hearing officers in any event did not have to reduce proposed rents." *Id.* at 9-10. The dissent, relying on *Agins*, argued that the plaintiff's basic contention — that "providing financial assistance to impecunious renters is not a state interest that can be legitimately furthered by regulating the use of property" — did not depend on how the law was actually applied, and therefore the claim was ripe for adjudication. *Id.* at 18-19. The majority's rejection of this argument necessarily presupposed that the *Agins* means-ends language did not provide a general test for determining whether land use regulations effect a taking.

Not surprisingly, the overwhelming majority of lower federal and state courts that have addressed the issue has rejected the suggestion that the *Agins* language can sensibly be read to establish a free-standing test for a compensable taking. The federal courts with specialized jurisdiction to hear claims under the Takings Clause, in particular, have been absolutely clear on this point. Eight years after the Court's *Agins* decision, Chief Judge Loren Smith of the U.S. Court of Federal Claims rejected the suggestion that means-ends scrutiny provided an independent basis for finding a taking, stating that "*no* court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor v. United States*, 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (emphasis added). So far as we aware, no subsequent decision of the Court of Federal Claims or the Court of Appeals for the Federal Circuit has held that a compensable taking can be established on this basis.

Likewise, the overwhelming majority of state courts has rejected the suggestion that the *Agins* language creates a free-standing takings test. For example, last year the Rhode Island Supreme Court, in *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083 (R.I. 1997), explicitly overruled the trial

court's erroneous conclusion that "a regulatory taking can be compensable if the ordinance in question does not substantially advance any legitimate state interest," stating that "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause." *See also Mission Springs, Inc. v. Feature Realty, Inc.*, 1998 WL 195977 (Wash. 1998) (city's allegedly "arbitrary" and "illegal" denial of permit stated a claim under the due process clause, not the takings clause); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 60 So. 2d 541 (Fla. 1994) (rejecting prior court of appeals decision which relied on *Agins*); *cf. Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 n.10 (Mass. 1992) (reciting *Agins* language as independent takings test, but nonetheless concluding that illegality of government action, standing alone, does not demonstrate a compensable taking).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

JOHN D. ECHEVERRIA
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W
Washington, D.C. 20001
(202) 662-9850

Counsel of Record for Amici Curiae

June 4, 1998